CAS No.	Chemical Name	FR cite	Sunset dates
116–15–4	Hexafluoropropene	52 FR 21516, 6/8/87	Jan 22, 1994
123–31–9	Hydroquinone	50 FR 53145, 12/30/85	Dec. 11, 1994
149–57–5	2-Ethylhexanoic Acid	51 FR 40318, 11/6/86	June 19, 1993
328–84–7	3,4-Dichlorobenzotrifluoride	52 FR 23547, 6/23/87	Dec. 5, 1993
25550–98–5	Diisodecyl Phenyl Phosphite	54 FR 8112, 2/24/89	May 21, 1995

[1] Only substances obtained from the reforming of crude petroleum.

§§ 799.500, 799.925, 799.940, 799.1051, 799.1052, 799.1054, 799.1250, 799.1285, 799.1550, 799.1650, 799.2175, 799.2200, 799.3175, 799.3450, 799.4000, 799.4400 [Removed]

d. Sections 799.500, 799.925, 799.940, 799.1051, 799.1052, 799.1054, 799.1250, 799.1285, 799.1550, 799.1650, 799.2175, 799.2200, 799.3175, 799.3450, 799.4000, and 799.4400 are removed.

§ 799.5000 [Amended]

e. Section 799.5000 is amended by removing from the table the complete entries for the following substances and/or mixtures: Aniline, 2-nitroaniline, 2-chloroaniline, 3,4-dichloroaniline, 2,4-dinitroaniline, 2,6-dicloro-4-nitroaniline, 4-nitroaniline, 4-chloroaniline, 3,4-dichlorobenzotrifluoride, and diisodecyl phenyl phosphite.

[FR Doc. 95–14910 Filed 6–16–95; 8:45 am]
BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 63

[CC Docket No. 87–266; FCC 95–203]

Cross-Ownership Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission has voted to adopt the tentative conclusion regarding the Commission's legal authority to grant waivers to telephone companies allowing them to provide video programming directly to subscribers in their telephone service areas. For ''good cause'' the Commission may waive Section 613(b) of the Communications Act, the cable-telco cross-ownership restriction, where a waiver is ''justified by the particular circumstances.'' In response to the decisions of the Fourth and Ninth Circuits which found Section 613(b) unconstitutional on First Amendment grounds, the Commission concluded that under Section 613(b)(4), the waiver provision, it has the legal authority to grant waivers to allow telephone companies to provide video programming in their telephone service areas on video dialtone networks. The Commission further concluded that waiving the restriction in that manner is fully consistent with the language of the statute and Section 613(b)'s underlying policy, and obviates the constitutional infirmities identified by the court of appeals. This order is intended to provide guidance to the public regarding the Commission's legal authority to grant waivers of the cable-telco cross-ownership rule to telephone companies seeking to provide video programming directly to subscribers in their telephone service areas.

EFFECTIVE DATE: June 19, 1995.

FOR FURTHER INFORMATION CONTACT: Aliza Katz, Office of General Counsel, (202) 418–1720.

SUPPLEMENTARY INFORMATION: A summary of the Commission's *Third Report and Order* (TR&O), adopted May 16, 1995 and released May 16, 1995, is set forth below. The full text of this document is available for inspection and copying during normal business hours in the Administrative Law Division, Office of General Counsel (Room 616), 1919 M Street NW., Washington, DC. The full text may also be purchased from the Commission's copy contractor, International Transcription Services, Inc. (ITS), 2100 M Street NW., Suite 140, Washington, DC 20037.

Summary of Third Report and Order

Introduction. In this *Third Report and Order,* we adopt the tentative conclusion set forth in the *Fourth Further Notice of Proposed Rulemaking* (''*Fourth FNPRM*''), 60 FR 8996, February 16, 1995, in the above captioned docket regarding the Commission's legal authority to waive Section 613(b) of the Communications Act, 47 U.S.C. § 533(b). Section 613(b) generally prohibits telephone companies from providing ''video programming directly to subscribers in the[ir] telephone service area.'' However, the statute expressly authorizes us to waive the restriction for ''good cause.'' We conclude that Section 613(b)(4) authorizes us to grant waivers to allow telephone companies to provide video programming directly to subscribers in their telephone service areas under certain conditions. In particular, in response to decisions of the Fourth and Ninth Circuits, we conclude that under Section 613(b)(4) we have the legal authority to grant waivers allowing telephone companies to provide video programming in their telephone service areas on video dialtone networks. We adopt that construction of the waiver provision because it is fully consistent with the language of the statute and Section 613(b)'s underlying policy, and because waiving the restriction in that manner obviates the constitutional infirmities identified by the courts of appeals.

2. *Background and Summary.* Section 613(b), the ''cable-telco cross-ownership rule,'' prohibits a telephone company from operating a cable system where it has a monopoly on local telephone service. Although Section 613(b) does *not* bar a telephone company from acting as a conduit to carry video programming selected and provided by an unaffiliated party, it *does* generally bar a telephone company from selecting (or ''exerting editorial control over'') and providing the video programming carried over its wires in its local service area. Two counts of appeals, the Fourth and Ninth Circuits, have recently held Section 613(b) unconstitutional because it prohibits telephone companies from choosing the video programming to be provided in their local exchange telephone service areas *altogether. See US West, Inc.* v. *United States,* 48 F.3d 1092 (9th Cir. 1995) (US West); *Chesapeake and Potomac Tel. Co.* v. *United States,* 42 F.3d 181 (4th Cir. 1994) (*C&P*). In so holding, both courts referred to the Commission's 1992 recommendation to Congress is our video dialtone docket, a proposal that the Ninth Circuit described in *US West* as a ''more speech-friendly plan'' than the absolute ban contained in the statute. Under the Commission's legislative recommendations, as described by the Fourth Circuit in *C&P,* ''telephone companies' editorial control

over video programming [would be limited] to a fixed percentage of the channels available; the telephone companies would be required to lease the balance of the channels on a common carrier basis to various video programmers.'' In short, the courts of appeals have held that a complete ban on editorial control over video programming in a telephone company's service area ''burden[s] substantially more speech than is necessary,'' especially since there appeared to be an ''obvious less-burdensome alternative[]''—allowing the telephone company to provide some video programming in their telephone service areas on a video dialtone system.

3. We now conclude, as we previously proposed in the *Fourth NPRM,* that we have the authority to grant waivers to telephone companies pursuant to Section 613(b)(4) allowing them to provide video programming directly to subscribers in their telephone service areas over video dialtone networks. Section 613(b)(4) provides that upon a showing of ''good cause'' the Commission may waive the cable-telco cross-ownership restriction where a waiver is ''justified by the particular circumstances * * *, taking into account the policy'' underlying the cross-ownership restriction.

4. Construing the waiver provision to authorize telephone companies to provide video programming over video dialtone networks avoids the constitutional infirmity identified by the Fourth and Ninth Circuits by making available the '' 'obvious less-burdensome alternative' '' referenced by those courts. Moreover, it is our duty to so construe the statute. The Supreme Court has recently reiterated in *United States* v. *X-Citement Video, Inc.,* 115 S. Ct. 464, 467 (1964), that ''a statute is to be construed where fairly possible so as to avoid substantial constitutional questions.'' [1]

5. In light of the ongoing litigation concerning the constitutionality of Section 613(b), we have decided to adopt the construction of Section 613(b)(4) that we proposed in the *Fourth FNPRM* before answering the other questions presented in this rulemaking.

6. *Discussion.* In the *Fourth FNPRM,* we asked for comment on the terms and conditions under which local telephone companies should be permitted to provide video programming directly to subscribers in their local service areas. For instance, we asked whether we should permit them to do so over video dialtone systems. While we construe Section 613(b)(4), the waiver provision, as authorizing us to permit telephone companies to act as programmers on video dialtone systems pursuant to certain conditions, the remaining issues raised in the *Fourth FNPRM* will be resolved in a further order in this proceeding.

7. Two statutory issues are presented in construing Section 613(b)(4): (1) whether ''good cause'' exists to waive the statutory restriction to permit a telephone company that wants to provide programming in its service area to do so over a video dialtone system, and (2) whether ''the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection,'' when a telephone company requests waiver of Section 613(b) to provide video programming over a video dialtone system.

8. As the D.C. Circuit recognized in its 1990 *NCTA* v. *FCC* decision, ''the policy [of Section 613(b)] is to promote competition.'' When the Commission adopted its cable-telco cross-ownership rules in 1970, it sought to prevent the telephone companies from using their monopoly position to preempt the market for cable service by excluding others from entry. Since 1970, however, the cable industry has grown from a fledgling service to a more mature industry that now serves a majority of households and Congress's interest in ensuring that the cable industry not be extinguished before it is established is no longer relevant. ''Good cause'' is a phrase that is commonly associated with changed circumstances. The relevant circumstances have changed greatly since the Commission adopted its cross-ownership rules in 1970 and Congress ''modeled [Section 613(b)] after the FCC['s] rules'' in 1984.

9. We also conclude that significant advances in technology have changed the circumstances relevant to determining whether telephone companies should be permitted to provide video programming directly to subscribers in their service areas. These developments have made it possible for a multitude of programmers to reach end user customers and have mitigated to a fair degree the competitive concerns that led the Commission and Congress to adopt the cross-ownership ban. These technological developments also support the conclusion that ''good cause'' exists to authorize telephone companies to provide video programming within their service areas where that will promote competition in the multichannel video programming market.

10. We also conclude that the rules we will promulgate in the immediate future to authorize telephone companies to provide video programming in their service areas will constitute ''particular circumstances * * *, taking into account the policy'' of Section 613(b). While we have not yet adopted definitive rules governing the conditions under which telephone companies may be permitted to act as video programmers over their video dialtone systems, the outline of two of those requirements is clear. First, video dialtone necessarily includes a common carriage element, and we have previously concluded that a telephone company may not allocate all or substantially all of its capacity to a single ''anchor programmer.'' Second, our current video dialtone rules contain provisions intended to ensure that telephone companies providing video programming directly to subscribers do not discriminate in favor of their affiliated programmers and do not subsidize video programming operations with rates collected from their provision of monopoly telephone services. These restrictions are intended to promote the underlying purpose of Section 613(b) by fostering fair competition in the multi-channel video programming market.[2]

11. Construing the waiver provision to authorize telephone companies to provide video programming pursuant to our video dialtone rules obviates the constitutional difficulties associated with Section 613(b). Specifically, the Fourth Circuit and Ninth Circuit have held that the cable-telco cross-ownership restriction ''burden[s] substantially more speech than is necessary'' to promote the government's interest in promoting a competitive multi-channel video programming market. Waiving Section 613(b), however, constitutes implementation of the ''obvious less burdensome alternative'' to the ban identified by the

[1] While the courts have identified video dialtone as a possible means by which telephone companies could provide programming in their service areas to remedy the constitutional infirmities of Section 613(b), and while we agree with the suggestion of these courts that waiving Section 613(b) as discussed above will cure these constitutional infirmities, we will address the terms and conditions under which telephone companies should be permitted to provide video programming directly to subscribers in their local service areas in a subsequent order addressing the other issues raised in the *Fourth FNPRM.*

[2] It is possible that we will decide in the ongoing rulemaking proceeding that telephone companies ought to be permitted to provide traditional cable service, rather than participate as programmers on video dialtone systems, under ''particular circumstances'' that will promote competition in the multichannel video programming market.

Fourth Circuit.[3] Or, to quote the Ninth Circuit, it implements the ''more speech-friendly plan that allows telephone companies ''to compete in the video programming market'' while ''requiring that a portion of their transport volume be set aside for sale to unaffiliated third parties on a common carrier basis.'' As a result of our construction of the waiver provision, telephone companies' free speech interests are not unduly burdened.

12. The fact that waiver of the cable-telco cross-ownership restriction obviates the constitutional difficulties identified by the courts of appeals supports our decision to construe our waiver authority to permit telephone companies to provide video programming over video dialtone systems. As the Supreme Court recently reiterated in *X–Citement Video,* ''a statute is to be construed where fairly possible so as to avoid constitutional questions,'' The Court also articulated this principle in *Jean* v. *Nelson,* 472 U.S. 846 (1985), when it found that ''[p]rior to reaching any constitutional questions federal courts must consider nonconstitutional grounds for decision.''

13. Several commenters opposed our reading of the wavier provision. Southwestern Bell argued that our proposal constitutes an evisceration of the rule. That is not so. It would eviscerate the statute if we were to waive Section 613(b) to allow telephone companies to provide video programming directly to subscribers in their service areas over video dialtone facilities *and*, as a general matter, to purchase cable systems in their telephone service areas that do not face competition. But we are not authorizing such waivers in this order. Instead, we conclude only that Section 613(b)(4) authorizes us to waive the cable-telco cross-ownership rule to permit a telephone company to provide video programming over video dialtone systems in its telephone service area in competition with existing cable operators, a result that *furthers* the purpose of the rule.[4]

14. Both the United States Telephone Association and US West invoke *Secretary of State of Maryland* v. *Munson,* 467 U.S. 947 (1984), to argue that the statute cannot be saved by its waiver provision. But this case is not at all similar to *Munson.* The *Munson* case involved a 25% limitation on the percentage of funds a charitable organization could keep, on the theory that a charity that used less than 75% of the funds that it raised on charitable purposes was engaged in fraud. The Court invalidated the state statute imposing the limitation upon concluding that ''[t]he flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on the fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud.'' Moreover, the Court concluded that the statute stifled speech and discriminated against certain viewpoints, explaining that ''the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular.'' The Court went on to hold that the statute was not saved by a provision allowing for waivers of the limitation. The Court stated that ''[b]y placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech.'' ''Particularly where the percentage limitation is so poorly suited to accomplishing the State's goal,'' the Court added, ''and where there are alternative means to serve the same purpose, there is little justification for straining to salvage the statute by invoking the possibility of official dispensation to engage in protected activity.'' In this case, in contrast, permitting telephone companies to provide video programming over a video dailtone system plainly advances the goal of making programming for a variety of sources available to the public—a goal that furthers rather than hinders First Amendment interests. Unlike *Munson,* speech is not stifled and unpopular viewpoints are not disadvantaged. Moreover, no discretion remotely comparable to that in *Munson* would be lodged in any official to grant or deny particular waivers under our approach. Rather, as part of any decision under 47 U.S.C. § 214 authorizing a telephone company to construct facilities, we will routinely grant a waiver of Section 613(b) where the telephone company agrees to abide by the regulations we will establish governing its provision of video programming. Accordingly, there is no ''threat of censorship that by its very existence chills free speech.''

15. In light of our duty to interpret Section 613(b) in a fashion that renders the statute constitutional, there is no merit at all to the suggestion by some commenters that the Commission's interpretation of Section 613(b)(4) is barred by res judicata, collateral estoppel, or some unnamed principle that allegedly prevents the Commission from construing a statute that a court has held unconstitutional. In *X-Citement Video,* the Supreme Court read the federal child pornography statute in a manner that the Court acknowledged was not its ''most natural grammatical reading'' in order to avoid a serious constitutional issue after a court of appeals had held the statute unconstitutional. In particular, the Court held that the statute required the government to prove that the defendant in a child pornography case knew that the material on which the prosecution was based contained child pornography even though the statute did not appear to contain such a scienter requirement. In this case, in contrast, the language of the waiver provision is flexible, speaking of ''good cause'' and ''particular circumstances * * *, taking into account the policy of this subsection.'' Unlike the Court in *X-Citement Video,* we do not have to strain to construe the waiver provision so that it renders the statute constitutional. Rather, as we have explained, we believe that such an interpretation is fully consistent with both the language of the waiver provision and the policy underlying Section 613(b), and therefore is the best interpretation of Section 613(b)(4). For those reasons, and in light of the fact that such an interpretation also avoids a serious constitutional issue, we now adopt our tentative conclusion that the waiver provision should be interpreted to authorize us to consider and approve requests by telephone companies to provide video programming over video dialtone systems, subject to the rules we have enacted and any further rules we will enact to govern video dialtone systems.

16. Finally, we also conclude that our reading of Section 613(b)(4) is not foreclosed by the D.C. Circuit's 1990 decision in *NCTA* v. *FCC,* 914 F.2d 285 (D.C. Cir. 1990). That case did not involve video dialtone service and presented no constitutional issue. It instead involved a waiver of FCC cross-ownership rules authorizing a cable operator to provide cable service over a

[3] We recognize that the Fourth Circuit reserved judgment on the constitutionality of our recommended model. *C&P,* 42 F.3d at 202 n.34. However, if that recommended approach does not render the statute constitutional then, contrary to the court's holding it is not '' 'Kobvious less-burdensome alternative,' '' because it is no alternative at all. *Id.* at 202.

[4] We do not decide today whether we could grant a waiver authorizing a telephone company to build a traditional cable system in its telephone service area in competition with an existing cable system. Nor do we address the conditions under which a waiver might be warranted to allow a telephone company to purchase an in-region cable system.

telephone companies' wires even though the cable operator was affiliated with the telephone company in violation of the rules by virtue of their joint interest in the contractor that was to build the cable system. The court acknowledged that the project ''presents a number of advantages that might justify a good cause waiver.'' However, it held that the Commission had ''failed * * * to explain why any of these advantages require [the contractor's] participation as [the telephone companies'] contractor.'' In this case, in contrast, in light of the decisions holding Section 613(b) unconstitutional, it is necessary to waive Section 613(b) to allow affiliates of telephone companies to provide video programming in order to render the statute constitutional. The Ninth Circuit recognized that a waiver might be warranted in these circumstances in *GTE California, Inc.* v. *FCC,* 39 F.3d 940 (1994), a case that (unlike *NCTA* v. *FCC*) involved a constitutional challenge to Section 613(b). The Ninth Circuit stated in that case, in response to the argument that Section 613(b) is unconstitutional, that ''GTECA did not present the constitutional issue to the Commission at a point in this proceeding where it could have tried to obviate the constitutional question by granting discretionary relief, such as a permanent waiver.'' As that statement recognizes, a waiver is warranted to implement what the Ninth Circuit in *US West* termed our ''more speech-friendly plan'' and hence avoid a serious constitutional issue.

17. *Conclusion.* Accordingly, it is ordered that Section 613(b)(4) of the Communications Act is interpreted to authorize waivers permitting telephone companies to provide video programming directly to subscribers in their telephone service area pursuant to the rules we will adopt in this docket or related rulemaking proceedings.

List of Subjects in 47 CFR Part 63

Ownership rules, Telephone.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 95–14833 Filed 6–16–95; 8:45 am]

BILLING CODE 6712–01–M

47 CFR Part 73

[MM Docket No. 92–196; RM–8041]

Radio Broadcasting Services; Tallassee and Tuskegee, AL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document reallots Channel 260A from Tuskegee to Tallassee, Alabama, and modifies the license of WACQ, Incorporated for Station WACQ-FM, as requested, pursuant to the provisions of Section 1.420(i) of the Commission's Rules. The allotment of Channel 260A to Tallassee will provide a first local FM service to the community without depriving Tuskegee of local aural transmission service. *See* 57 FR 44354, September 25, 1992. Coordinates used for Channel 260A at Tallassee, Alabama, are 32–26–30 and 85–47–45. With this action, the proceeding is terminated.

EFFECTIVE DATE: July 28, 1995.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MM Docket No. 92–196, adopted June 6, 1995, and released June 13, 1995. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857–3800, located at 1919 M Street, NW., Room 246, or 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Alabama, is amended by removing Channel 260A at Tuskegee, and by adding Tallassee, Channel 260A.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 95–14835 Filed 6–16–95; 8:45 am]

BILLING CODE 6712–01–F

47 CFR Part 73

[MM Docket No. 91–129; RM–7664]

Radio Broadcasting Services; Lake Havasu City, AZ

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots FM Channel 244C2 to Lake Havasu City, Arizona, as that community's fourth local FM service, in response to a petition for rulemaking filed on behalf of Bridge Broadcasting. *See* 56 FR 21465, May 9, 1991. Coordinates used for Channel 244C2 at Lake Havasu City are 34–29–02 and 114–19–18. Lake Havasu City is located within 320 kilometers (199 miles of the United States-Mexico border and therefore, concurrence of the Mexican government to this proposal was obtained. With this action, the proceeding is terminated.

DATES: Effective July 28, 1995. The window period for filing applications on Channel 244C2 at Lake Havasu City, Arizona, will open on July 28, 1995, and close on August 28, 1995.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418–2180. Questions related to the window application filing process for Channel 244C2 at Lake Havasu City, Arizona, should be addressed to the Audio Services Division, FM Branch, (202) 418–2700.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MM Docket No. 91–129, adopted June 5, 1995, and released June 13, 1995. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857–3800, located at 1919 M Street, NW., Room 246, or 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of the title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.